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Nos. 95-1478 and 95-1503

In the Supreme Court of the United States

OCTOBER TERM, 1996

JAY PRINTZ, SHERIFF/CORONER, RAVALLI COUNTY, MONTANA, PETITIONER

v.

UNITED STATES OF AMERICA

RICHARD MACK, SHERIFF, GRAHAM COUNTY, PETITIONER

v.

UNITED STATES OF AMERICA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

The Brady Handgun Violence Prevention Act (Brady Act) provides that, within five business days of a firearms dealer's proposal to transfer a handgun, the "chief law enforcement officer" (CLEO) of the transferee's residence shall make a "reasonable effort" to determine whether the transferee's receipt or possession of the handgun would be illegal. 18 U.S.C. 922(s)(2). If the CLEO determines that the transferee's receipt or possession of the handgun would not be illegal, the CLEO shall destroy the records relating to the transfer. 18 U.S.C. 922(s)(6)(B)(i). If the CLEO determines that the receipt or possession of the gun would be illegal, he shall, upon request by the transferee, provide in writing the reason for his determination. 18 U.S.C. 922(s)(6)(C).

The question presented is whether those provisions of the Brady Act exceed Congress's power under the Commerce Clause or contravene constitutional principles of federalism embodied in the Tenth Amendment.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-25a)[1] is reported at 66 F.3d 1025. The opinion of the district court in *Printz* v. *United States* (Pet. App. 30a-66a) is reported at 854 F. Supp. 1503. The opinion of the district court in *Mack* v. *United States* (95-1503 Pet. App. 26-50) is reported at 856 F. Supp. 1372.

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[1] Unless otherwise noted, "Pet. App." refers to the appendix to the petition in No. 95-1478. "U.S. Resp. App." refers to the appendix to the United States' response to that petition.

JURISDICTION

The judgment of the court of appeals was entered on September 8, 1995. Petitions for rehearing were denied on December 19, 1995. Pet. App. 28a-29a. Petitions for a writ of certiorari were filed on March 15, 1996 (No. 95-1478) and March 18, 1996 (No. 95-1503), and were granted on June 17, 1996. 116 S. Ct. 2521. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause (Art. I, § 8, Cl. 3) and the Tenth Amendment of the United States Constitution are reproduced at Pet. App. 75a. The Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536, is reproduced at Pet. App. 75a-93a.

Section 928 of Title 18, United States Code, provides: "If any provision of this chapter or the application thereof to any person or circumstances is held invalid, the remainder of the chapter and the application of such provision to other persons not similarly situated or to other circumstances shall not be affected thereby."

STATEMENT

1. a. The Gun Control Act of 1968 (GCA), 18 U.S.C. 921 *et seq.*, establishes a comprehensive federal scheme governing the manufacture, importation, and distribution of firearms in interstate commerce. Under the GCA, no person without a federal license may make or sell firearms, 18 U.S.C. 922(a)(1)(A), and the conditions under which firearms may be made and sold are subject to detailed regulation.

The GCA makes it unlawful for certain persons, such as convicted felons, to receive or possess firearms in or affecting interstate commerce. 18 U.S.C. 922(g). It is also unlawful for any person to transfer a firearm to another, knowing that the transferee is prohibited by Section 922(g) from receiving or possessing a firearm. 18 U.S.C. 922(d). The GCA further prohibits federally licensed firearms dealers from transferring a firearm to anyone who is less than 18 years old, who does not reside in the dealer's State, or who would be prohibited by state or local law from purchasing or possessing a firearm. 18 U.S.C. 922(b)(1)-(3).[2]

In the Brady Handgun Violence Prevention Act, Pub. L. No. 103-159, Tit. I, 107 Stat. 1536 (1993) (Brady Act or Act), Congress amended the GCA to address the national "epidemic of gun violence" by enhancing enforcement of existing federal regulation of gun dealers. See H.R. Rep. No. 344, 103d Cong., 1st Sess. 7-8 (1993) (House Report); *id.* at 9 (noting that, despite existing federal prohibitions on gun transfers by firearms dealers, a "major source of criminals' guns are gun shops"). The Act requires the Attorney General to establish a national instant criminal background check system by November 30, 1998. 18 U.S.C. 922 note. Once that system is in place, firearms dealers will be required (with certain exceptions) to contact it to determine whether any legal impediment exists to the sale

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[2] Since petitioners' opening briefs were filed, an amendment to the GCA has added, to the categories of persons not permitted by federal law to receive guns, those convicted of certain misdemeanor offenses, having as an element the use or attempted use of physical force or threatened use of a deadly weapon, committed by the spouse, domestic partner, parent, or guardian of the victim. Department of Defense Appropriations Act, 1997, Pub. L. No. 104-208, Div. A, § 101(f), Tit. VI, § 658 (110 Stat. 3009) (Sept. 30, 1996); see 142 Cong. Rec. H11,743 (daily ed. Sept. 28, 1996).

of a firearm. 18 U.S.C. 922(t)(1)(A). Under the national instant check system, the transfer may go forward only if the system verifies that the transferee's receipt of the gun would not be illegal, or if three business days elapse after the dealer contacts the system. 18 U.S.C. 922(t)(1)(B) and (t)(2).

Because the national instant check system may not be fully operative until late 1998, Congress also enacted interim provisions to enhance enforcement of the GCA's transfer restrictions. See House Report 10. The interim provisions, which are the subject of this case, operate in relation to proposed transfers of handguns by federally licensed firearms dealers. Under the interim provisions, a firearms dealer who proposes to transfer a handgun must provide the "chief law enforcement officer" (CLEO) of the transferee's residence with information about the proposed transfer. 18 U.S.C. 922(s)(1)(A). The dealer may not make the transfer until five business days have elapsed after providing such notice to the CLEO, unless, within that five-day period, the CLEO informs the dealer that the CLEO has no information that the transferee's receipt of a handgun would be illegal. See 18 U.S.C. 922(s)(1)(A)(ii)(II). The transfer may go forward after five business days if the dealer receives no information from the CLEO at all. See 18 U.S.C. 922(s)(1)(A)(ii)(I).[3]

To enable CLEOs to determine whether transfer of a handgun would be illegal, prospective handgun purchasers must provide firearms dealers with their name, address,

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[3] The Brady Act defines the "chief law enforcement officer" as "the chief of police, the sheriff, or an equivalent officer or the designee of any such individual." 18 U.S.C. 922(s)(8). The Brady Act's interim provisions do not apply in States and Territories that have their own background check requirements. 18 U.S.C. 922(s)(1)(C) and (D); see 59 Fed. Reg. 37,532, 37,534 (1994) (Bureau of Alcohol, Tobacco, and Firearms (ATF) identification of exempt jurisdictions).

and date of birth. 18 U.S.C. 922(s)(1)(A)(i)(I) and (s)(3)(A). The dealer must then give that information to the CLEO. 18 U.S.C. 922(s)(1)(A)(i)(III) and (IV).[4] During the ensuing five-day waiting period, the CLEO "shall make a reasonable effort" to determine whether a legal impediment exists to the proposed sale:

> A chief law enforcement officer to whom a transferor has provided notice * * * shall make a reasonable effort to ascertain within 5 business days whether receipt or possession [of the handgun] would be in violation of the law, including research in whatever State and local recordkeeping systems are available and in a national system designated by the Attorney General.

18 U.S.C. 922(s)(2). It is that provision for a "reasonable effort to ascertain" whether receipt or possession of the handgun would be illegal to which petitioners principally object.

The Act imposes two further administrative obligations on CLEOs who undertake record checks pursuant to Section 922(s)(2). If the CLEO determines that the receipt of the handgun by the transferee would be illegal, he must, upon request, provide the would-be purchaser with his reasons for that conclusion in writing. 18 U.S.C. 922(s)(6)(C). If, on the other hand, the CLEO does not conclude that the transfer would be illegal, he must destroy the records relating to the transfer. 18 U.S.C. 922(s)(6)(B)(i). The Act does not, however, require that a CLEO notify the dealer (or otherwise act to prevent the transfer of a handgun)

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[4] ATF has also provided, by regulation, that dealers may request additional, optional information of the transferee (such as the transferee's height, weight, place of birth, and social security number) to reduce the chances of an erroneous identification of the transferee. See 59 Fed. Reg. 7110 (1994); 27 C.F.R. 178.130(a)(2).

even if the CLEO concludes that the purchaser's receipt of the gun would be illegal.

The Act provides CLEOs with immunity from damages actions for failing to prevent an unlawful handgun sale, or for mistakenly concluding that a transfer would be contrary to law. 18 U.S.C. 922(s)(7). In addition, although the Brady Act establishes criminal penalties for knowing violations of the Act, see 18 U.S.C. 924(a)(5), the Department of Justice has concluded that those criminal sanctions do not apply to CLEOs who fail to abide by Section 922(s)(2). See Pet. App. 18a-19a.

b. Shortly after enactment of the Brady Act, the Bureau of Alcohol, Tobacco and Firearms (ATF), which is charged with interpretation and implementation of the GCA (see 18 U.S.C. 926; 37 Fed. Reg. 11,696-11,697 (1972)), issued an open letter providing guidance to CLEOs on the "reasonable effort" provision of the Brady Act. See U.S. Resp. App. 13a-17a. ATF made clear that, while the Brady Act generally "anticipates some minimal effort to check commonly available records," CLEOs are not obliged to check "every conceivable record system that may contain information relating to categories of prohibited persons." *Id.* at 13a-14a. ATF further stated that, since the "vast majority of [disqualified] persons * * * are prohibited by virtue of some criminal background," a CLEO's reasonable effort should normally focus on "[c]riminal record systems." *Id.* at 14a. ATF also suggested that, in States with centralized mental health records, those records "could also be searched if accessible." *Ibid.*

ATF explained that, since CLEOs themselves are in the "best position to determine" what constitutes a "reasonable effort," "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction."

U.S. Resp. App. 14a-15a. ATF noted finally that, in some circumstances, as when a CLEO has personal knowledge of a gun purchaser, a CLEO may legitimately decide that it is "reasonable" to do no research at all. *Id.* at 14a.

2. a. Petitioner Printz is the Sheriff of Ravalli County, Montana. Pet. App. 4a. He brought suit in district court, contending that several of the Brady Act's interim requirements, including the requirement that he make a "reasonable effort" to ascertain if there is a legal impediment to a handgun sale, violate the Tenth Amendment. *Id.* at 32a. The district court held that the "reasonable effort" requirement violates the Tenth Amendment. *Id.* at 66a. It also concluded, however, that CLEOs' other obligations under the Act do not contravene the Tenth Amendment. *Id.* at 61a-63a. The court held further that the "reasonable effort" provision is severable from the remainder of the Brady Act, including the Act's five-day waiting period for handgun sales. *Id.* at 66a.

b. Petitioner Mack is the Sheriff of Graham County, Arizona. 95-1503 Pet. App. 3. He also brought suit in district court, contending, as did Sheriff Printz, that the Brady Act's interim requirements for CLEOs contravene the Tenth Amendment. *Id.* at 3, 47-48 n.11. The district court held that the "reasonable effort" requirement contravenes the Tenth Amendment. *Id.* at 43. It also ruled, however, that the record check provision is severable from the remainder of the Act, including the five-day waiting period. *Id.* at 49.[5]

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[5] Both petitioners also contended that the Brady Act's provision for criminal penalties for knowing violations of Section 922(s) (see 18 U.S.C. 924(a)(5)), violates the Due Process Clause of the Fifth Amendment as applied to them. Pet. App. 18a. The court of appeals held (*id.* at 19a) that petitioners' due process claim was not ripe for review because, in light of the Department of Justice's official conclusion that Section 924(a)(5) does not apply to CLEOs (see p. 6,

c. A divided panel of the court of appeals upheld all the challenged provisions. Pet. App. 1a-25a. The court concluded that the Brady Act does not transgress any "implied limitation on federal power" (*id.* at 8a), and that there is "nothing unusually jarring to our system of federalism" in the challenged provisions (*id.* at 9a). The court noted that this Court has rejected the argument that "Congress has no power to impose on a State officer, as such, any duty whatever, and compel him to perform it," as "not representative of the law today." *Ibid.* (quoting *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982)).

The court of appeals rejected in particular petitioners' contention that, under *New York* v. *United States*, 505 U.S. 144 (1992), "the federal government is now flatly precluded from commanding state officers to assist in carrying out a federal program." Pet. App. 10a. The court explained that "[t]he constitutional evil that *New York* addressed" was that "the federal government was attempting to direct the States to enact their own legislation or regulations according to a federal formula." *Ibid.* That Tenth Amendment concern, the court explained, is focused on "federal coercion of a State's enactment of legislation or regulations or creation of an administrative program," because such coercion infringes the States' sovereign authority to set policy and undermines political accountability. *Id.* at 13a. "When the federal government requires the States to enact legislation, the enacted legislation is *state* legislation. Thus, it will likely 'be state officials who will bear the brunt of public disapproval, while the federal officials who devised the regulatory program may remain insulated from the electoral ramifications of their decision.'" *Ibid.* (quoting *New York*, 505 U.S. at 169).

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supra), petitioners do not face a credible threat of prosecution. Petitioners have not renewed their due process claim in this Court.

The court concluded that the Brady Act "is not the kind of a federal mandate condemned by *New York*." Pet. App. 14a. It stressed that CLEOs "are not being commanded to engage in the central sovereign processes of enacting legislation or regulations" and "are not even being asked to produce a state policy, for which the state must bear political accountability." *Ibid.* Moreover, it stated, CLEOs' duties under the Act "represent a minimal interference with state functions. In that sense, their duties are not different from other minor obligations that Congress has imposed on state officials." *Ibid.*

Although the court assumed that "there is likely to be some point at which a federal statute that enlists the aid of state employees can become so burdensome to the State that it violates the Tenth Amendment," it nonetheless concluded that "the Brady Act does not approach that point." Pet. App. 15a. The court observed that petitioners have not been subjected to any requirement to do more "than check computer records" (*id.* at 15a-16a), and it stated that, on the record before it, it "[could not] conclude that 'a reasonable effort' inevitably requires more than [a] minimum for [petitioners]. To perform such computer checks * * * has not been shown to constitute the kind of interference with state functions that would raise Tenth Amendment concerns." *Id.* at 16a.[6]

SUMMARY OF ARGUMENT

I. A. In the Brady Act, Congress responded to a national epidemic of handgun violence by enhancing federal regulation of firearms dealers and federal restrictions on transfers of firearms. The policies of the Brady Act under challenge here involve simple record checks to determine

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[6] Judge Fernandez dissented in part. Pet. App. 22a-25a. He would have held unconstitutional the Brady Act's interim provisions challenged in this case. See *ibid.*

whether a transfer of a handgun would be unlawful, and a waiting period during which those checks can take place. The federal government is clearly responsible for the policy choices made in the Brady Act, as it was responsible for establishing, in the Gun Control Act of 1968, the categories of persons to whom firearms may not be transferred.

The Brady Act does not require the States to add anything in the way of policy to those choices made by the federal government, or otherwise to devise a solution to the problem of gun violence. Rather, the Brady Act calls on local officials, with the most ready access to the most relevant records, to give modest assistance in the implementation of the federal regulation of gun transfers between private parties by conducting the needed record checks. That assistance is temporary; by 1999, the federal government is required to have in place its own machinery for conducting the necessary checks.

The interim, limited, and nonpolicymaking participation by local officials in the Brady Act contravenes no constitutional principle of federalism. The interim provisions challenged here do not alter the fundamentally federal character of the approach devised by Congress and do not contravene the Commerce Clause or the Tenth Amendment. The Court has never held that Congress is absolutely barred from requiring local officials to assist in the application of federal law to private parties. In *Testa* v. *Katt*, 330 U.S. 386 (1947), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982), this Court made clear that state officeholders may be required to apply federal law to private persons.

New York v. *United States*, 505 U.S. 144 (1992), did not alter those established principles. In the statute under review in *New York*, Congress identified a national problem, the disposal of radioactive waste, but failed to enact a

federal solution. Rather, Congress required that the States devise solutions to that national problem, either by legislating their own solutions to the problem of radioactive waste, or by taking title to the waste and then devising an administrative system for its proper disposition. In that case, Congress commandeered the legislative and administrative policymaking apparatus of the States. That commandeering, the Court held, contravened the constitutional values of federalism by blurring the political accountability of elected officials to the people.

Although, under *New York*, Congress may not identify a national problem and then require the States to devise solutions, there is no constitutional rule preventing Congress from devising a national solution and then requiring limited local assistance in what is otherwise a comprehensive federal implementation of that solution. The Framers of the Constitution contemplated that the national government would make use of state officers to carry out some federal laws regulating private parties, including the collection of federal taxes. The early Congresses acted on that understanding when they required state officials to conduct administrative tasks involving registration of aliens. Later Congresses also imposed administrative obligations on state officials in other contexts, including immigration and draft registration. In the present day, several federal statutes require state and local participation in the administration of federal law, especially in the collection, reporting, and dissemination of information. These examples demonstrate that Congress may, from time to time, find it necessary and proper to enlist local officials in limited, nonpolicymaking aspects of the implementation of federal law. There is no historical evidence for any suggestion that this authority is likely to be abused by Congress as a means to undermine the functioning of the States.

B. The Brady Act does not contravene any other limit on the exercise of federal power that might be found in the structure of federalism. The text of the Brady Act requires only that CLEOs make a "reasonable effort" to conduct the record check, and the Act affords CLEOs broad discretion to determine the scope of that "reasonable effort," in light of their own resources and law enforcement priorities. The Bureau of Alcohol, Tobacco and Firearms, which administers the Brady Act, has made clear in its guidance interpreting the Act that it is generally "reasonable" for CLEOs to choose to fulfill their duties by consulting readily accessible criminal records. Thus, in light of their limited resources and competing obligations, CLEOs can and do meet their obligations by having clerical personnel perform checks of criminal records to the extent possible given the circumstances. The other requirements imposed on CLEOs under the Act are even more clearly *de minimis*.

C. The Commerce Clause provides no independent basis for a constitutional challenge to the Brady Act. The inquiries under the Commerce Clause and the Tenth Amendment are mirror images of each other. The commercial transfer of handguns and the possession of handguns in and affecting commerce are both within Congress's power to regulate, and the Brady Act addresses those matters. Record checks by CLEOs are reasonable means developed by Congress to regulate those aspects of commerce.

II. If this Court holds any of the challenged Brady Act provisions unconstitutional, it should not also invalidate the five-day waiting period imposed on firearms dealers, the dealers' obligation to provide information about transferees to the CLEOs, or the CLEOs' obligation to inform transferees of their reasons for preventing a transfer. The severability of the first two provisions is not before

the Court, because petitioners lack standing to challenge them.

In any event, all the challenged provisions of the Brady Act are severable from the rest of the Act. Without the provisions under constitutional challenge in this case, the remainder of the Brady Act would be fully operative as a law, and severing invalid parts of the Brady Act would be consistent with Congress's purpose of addressing gun violence by enhancing restrictions on gun transfers through record checks. Even if this Court invalidates the requirement that CLEOs conduct record checks, retaining the five-day waiting period and firearms dealers' obligation to inform CLEOs about proposed gun transfers will ensure that local officials will be informed about pending handgun transfers, and will have the time and information to conduct record checks if they choose to do so. The CLEO's duty to inform transferees, upon request, why a proposed transfer has been found to be illegal, would in effect be voluntary, because it would be undertaken only if the CLEO chose to conduct the record check.

ARGUMENT

I. THE INTERIM DUTIES OF CHIEF LAW ENFORCEMENT OFFICERS UNDER THE BRADY ACT ARE CONSISTENT WITH CONSTITUTIONAL PRINCIPLES OF FEDERALISM

A. Congress May Require Local Officials To Give Non-Policymaking Assistance In The Application Of Federal Laws To Private Persons

The Brady Act amends the Gun Control Act to enhance already existing federal restrictions on the transfer of handguns between private persons. Enacted by Congress and signed by the President after years of highly publicized debate, the Brady Act sets forth a federal solution to

a national problem, accompanied by federal funding and administered by the federal Bureau of Alcohol, Tobacco and Firearms (ATF). The principal policies of the Brady Act challenged in this case—staying the transfer of a handgun in or affecting commerce pending a limited record check—are readily identifiable as the policies of the national government.

The interim provisions challenged here require temporary, limited, non-policymaking assistance by CLEOs in giving effect to the federal scheme pending the establishment of a national instant background check system. The primary requirement under challenge requires that, during the interim period, CLEOs make a "reasonable effort" to ascertain, by consulting "available" records, whether a legal impediment exists to a proposed handgun sale. 18 U.S.C. 922(s)(2). The CLEOs are not required to establish any new legal restrictions on handgun transfers, but only to ascertain whether an already existing restriction is applicable to a particular case.

Petitioners characterize the burden imposed by this provision in various ways, but, at bottom, their contention does not turn on the nature of the duty created by the Brady Act, the degree of its supposed intrusion onto the functioning of their offices, or the extent to which it requires them to expend resources. Rather, their position is that Congress may not, under any circumstances and to any degree, require local officials to assist in the application of federal law to private persons, unless that requirement is imposed as a condition on the receipt of federal funds. That absolutist position finds no basis in this Court's jurisprudence of federalism or in the constitutional tradition that it reflects.

1. This Court's Decisions Establish That State And Local Officials May Be Required To Apply Federal Law To Private Persons

a. It is clear beyond dispute that constitutional principles of federalism are not violated merely because Congress requires state and local officials to perform a function under federal law. "[T]here are instances where the Court has upheld federal statutory structures that in effect directed state decisionmakers to take or to refrain from taking certain actions." *FERC* v. *Mississippi*, 456 U.S. 742, 761-762 (1982); see *South Carolina* v. *Baker*, 485 U.S. 505, 513-515 (1988). Article VI of the Constitution establishes that state and local executive officials may be required to carry out federal obligations, as well as duties imposed by the laws of their own jurisdiction. See *South Carolina* v. *Baker*, 485 U.S. at 514-515; Evan H. Caminker, *State Sovereignty and Subordinacy: May Congress Commandeer State Officers To Implement Federal Law?*, 95 Colum. L. Rev. 1001, 1028-1030 (1995). And that is true even if the congressional mandate imposes significant financial burdens on the local governmental entity. See, *e.g.*, *Garcia* v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528 (1985).

To the extent that federalism cabins Congress's ability to impose duties under federal law on local officials, the limits must therefore be found in the particular interest recognized in the Tenth Amendment, the protection of liberty through political accountability of public officials to the people. See *New York* v. *United States*, 505 U.S. 144, 181-183 (1992). Further, the nature of the specific obligation imposed by Congress must be closely examined to determine whether the federal obligation impairs that interest in a serious and substantial way. Cf. *South Carolina* v. *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring

in the judgment) (noting that principles of federalism are violated only if congressional action "operate[s] to directly displace the States' freedom to structure integral operations").

A constitutional problem exists when Congress, although identifying a national problem, chooses not to enact any federal solution but compels the States to devise their own regulatory approaches. In that situation, Congress literally "command[s] state legislatures to legislate" into existence a regulatory regime, *New York*, 505 U.S. at 179, and also encourages federal and state officials "to avoid being held accountable to the voters" for their decisions, *id.* at 182. See also *United States* v. *Lopez*, 115 S. Ct. 1624, 1642 (1995) (Kennedy, J., concurring) (principles of federalism are violated by "a formal command from the National Government directing the State to enact a certain policy").

No such constitutional difficulty is presented, however, when Congress itself devises a clear legislative solution that regulates private conduct, and calls upon local officials for limited, non-policymaking help in enforcing that law. In that situation, Congress does not force the States to make policy, and does not impair the constitutional value of federalism in preserving the accountability of public officials to the people. Put differently, the constitutional line is crossed only when Congress compels the States to make law in their sovereign capacities—but not when Congress requires the assistance of state or local officials in carrying out a broadly applicable federal law.[7]

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[7] To employ an analogy, Congress, acting within its enumerated powers, may preempt state law and require state courts to apply federal law exclusively as a rule of decision to a controversy. But it would be doubtful that Congress could require state legislatures to change their own state law, at federal command, and then compel state courts to apply that new state law. Thus, for example, Congress

Cf. *FERC*, 456 U.S. at 785 (O'Connor, J., concurring in part and dissenting in part) (describing the crucial interest protected by state sovereignty as "the power to choose subjects for legislation[,] * * * a fundamental attribute of legislative power").

b. The distinction discussed above is illustrated by the opposite results reached, on the one hand, in *Testa* v. *Katt*, 330 U.S. 386 (1947), and *FERC* v. *Mississippi*, 456 U.S. 742 (1982), and, on the other hand, in *New York* v. *United States*, 505 U.S. 144 (1992). In *Testa*, the Court held that state courts must follow a federal statutory requirement that they hear federal claims arising under federal law.[8] As the Court explained in *New York*, an important aspect of the requirement at issue in *Testa* was that it "involve[d] congressional regulation of individuals, not congressional requirements that States regulate." *New York*, 505 U.S. at 178. The Court also noted, however, that "[f]ederal statutes enforceable in state courts do, in a sense, direct state judges to enforce them." *Ibid.*; see also *FERC*, 456 U.S. at 762 (noting that *Testa* "reveals that the Federal Government has some power to enlist a branch of state

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might, without giving rise to any constitutional difficulty, enact a federal products liability law that preempted state law, and might thereby require state courts to apply the federal law to the exclusion of state law. A constitutional problem would be encountered only if Congress directed the state legislatures (or state courts) to change their own *state* products liability law, and apply it *as such*. Only the latter situation encroaches on the States' sovereign capacity to make their own law, and only the latter diminishes state officials' accountability to the people, by promoting the appearance that the States, not the national government, were responsible for the change in the law.

[8] *Testa* did not itself involve a Tenth Amendment challenge, but its relevance to the jurisprudence of federalism is made clear by the decisions in *New York* (505 U.S. at 178) and *FERC* (456 U.S. at 760-762).

government—there the judiciary—to further federal ends").

Similarly, in *FERC*, the Court—in a ruling joined by all nine Justices—sustained a federal statutory requirement, imposed by Section 210 of the Public Utility Regulatory Policies Act of 1978 (PURPA), that state utility commissions "implement" FERC rules designed to encourage power production at small plants. 456 U.S. at 759. That statutory mandate in practice required state executive branch officials to apply federal law to disputes involving private parties. *Id.* at 759-760; *id.* at 775-776 & n.1 (O'Connor, J., concurring in part and dissenting in part).[9]

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[9] Petitioners minimize the relevance of *FERC* and *Testa* as limited to the functions of state judges, but that argument is based on a misunderstanding of the Supremacy Clause. It is not only judges, but all state officials, who must adhere to federal law. See U.S. Const. Art. VI ("all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution"); *Ex parte Siebold*, 100 U.S. 371, 392 (1880) ("The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity."); see also *Voinovich* v. *Quilter*, 507 U.S. 146, 159 (1993) (noting that state non-judicial official who followed dictates of federal law in drafting apportionment plan "demonstrate[d] obedience to the Supremacy Clause"); Caminker, 95 Colum. L. Rev. at 1093 (explaining that "[t]he Supremacy Clause makes all federal laws the supreme law of the land for all individuals and institutions of state government").

Thus, the *FERC* Court upheld the requirement in PURPA that state *executive* officials enforce federal law. While the Court also noted that the administrative officials served as part of the State's "adjudicatory machinery" (456 U.S. at 761), its holding did not rest on that characterization. Although the state officials required to perform the challenged functions in *FERC* could execute them through a quasi-adjudicatory mechanism of dispute resolution (*id.* at 760), the Court did not hold that PURPA was constitutional as applied to them because they were "judicial Officers" within the meaning of Article VI.

In contrast to the unanimous rejection of the challenge to Section 210 of PURPA, the Court in *FERC* divided sharply with respect to the validity of other challenged provisions, which required that the States "consider" adopting certain energy standards as a matter of state law. *FERC*, 456 U.S. at 761-766. The Court recognized that those requirements—unlike Section 210—implicated significant interests of state sovereignty, *id.* at 761, but it emphasized that PURPA required only that the States "*consider* the suggested federal standards," *id.* at 765. The Court found nothing in PURPA " 'directly compelling' the States to enact a legislative program." *Ibid.*[10]

The provision invalidated in *New York* presented States with two alternatives, as pertinent here: a State could either legislate a regulatory scheme to provide for the disposal of all low-level radioactive waste generated within the State by 1996, or it could take title to the waste at that time. See 505 U.S. at 153-154. The first alternative, the Court emphasized, was a "command [to] state government to enact *state* regulation." *Id.* at 178 (emphasis in original). That directive therefore clashed with the constitutional rule that Congress may not "conscript" the States to legislate a regulatory regime. *Ibid.* The second alternative, the Court found, was fatally flawed for the same

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[10] In rejecting the challenge to PURPA's mandate that state utility commissioners consider federal energy standards, the Court also stated that, theoretically, the States could avoid the federal requirements by ceasing to regulate in the utilities field altogether. 456 U.S. at 764. But, contrary to the suggestion of petitioner Mack (Br. 18 n.8), that reasoning played no part in the Court's analysis of the separate requirement that state administrative agencies "implement" FERC rules by enforcing them against private parties. See 456 U.S. at 759-761. The Court also observed that it was highly "unlikely that the States will or easily can abandon regulation of public utilities to avoid PURPA's requirements." *Id.* at 767.

reason, because it effectively required each State to devise a *state* solution to a federally identified problem. See *id.* at 176. Accordingly, the Court held that both statutory alternatives were unconstitutional because both "commandeer[ed]" the States' political processes "by directly compelling them to *enact and enforce* a federal regulatory program." 505 U.S. at 176 (emphasis added). As Justice Kennedy later explained, the portions of the statute that were invalidated in *New York* were held unconstitutional because Congress had required the States "to enact a certain policy." *Lopez*, 115 S. Ct. at 1642 (concurring opinion).[11]

In *New York*, the Court stressed that, when Congress declines to enact a federal legislative solution and instead commands that States "enact and enforce" their own regulatory schemes to address a federal problem, Congress allows officials to avoid responsibility for controversial policy decisions: "Accountability is * * * diminished when, due to federal coercion, elected state officials cannot regulate in accordance with the views of the local electorate in matters not pre-empted by federal regulation." 505 U.S. at 169. And since the "power to make decisions and to set policy is what gives the State its sovereign nature" (*FERC*, 456 U.S. at 761), federal statutes mandating that state executive officials *make policy* at federal command

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[11] The decision in *New York* also upheld significant portions of the statute under challenge. The Court held that Congress could, pursuant to its power under the Spending Clause, require the States to achieve certain milestones in the regulation of radioactive waste as a condition to receipt of funds collected from federal taxes and placed in an escrow account. 505 U.S. at 171-173. The Court also held that Congress could, pursuant to its commerce power, authorize States to restrict and deny access to radioactive waste generated in other States that did not meet federal deadlines for addressing the disposal of such waste. *Id.* at 173-174.

also implicate the accountability concerns central to constitutional principles of federalism. See *ibid.* ("the ability of a state legislative (or, as here, administrative) body—which makes decisions and sets policy for the State as a whole—to consider and promulgate regulations of its choosing must be central to a State's role in the federal system").

Those problems do not exist here. In the GCA and the Brady Act, Congress itself has identified national problems (gun violence and ineffective restrictions on handgun sales) and has devised clear legislative solutions to those problems—specific categories of persons to whom handguns may not be transferred, limited record checks before handgun transfers take place, and waiting periods to permit those checks to occur. Congress has not required the States to make any substantive policy decisions about who should or should not be eligible to own handguns, nor has it instructed the States to devise solutions to the problem of gun violence. Rather, it has merely called on local officials to assist in the implementation of the federal regulation governing gun transfers, on the reasoning that those officials have the best access to the most relevant records, such as state felony convictions. Accordingly, the Brady Act does not contravene constitutional principles of federalism, for this case is controlled by *Testa* and *FERC*, rather than *New York*.

c. The Court in *New York* stated that the "Federal Government may not compel the States to enact or *administer* a federal regulatory program." 505 U.S. at 188 (emphasis added). Petitioners divorce that particular sentence from its context, and interpret it as establishing an absolute bar to any federal requirement that state and local officials assist in the implementation of national policy. See Printz Br. 15; Mack Br. 28. As the preceding discussion demonstrates, however, that sentence must be under-

stood in relation to the Court's expressed concern in *New York* that Congress had diminished the political accountability of public officials to the people (and had thereby encroached on liberty) by commandeering the machinery of state policymaking in *both* the legislative and administrative spheres. That concern for political accountability in administrative *policymaking* was fundamental to the decision in *New York*. If a State declined to legislate a radioactive waste regulatory regime and was therefore required by the federal statute to take title to such waste, it would have had to resolve administratively the same policy issues that would have confronted the state legislature. In effect, the State's administrators would have been compelled to create a state-law mechanism to address the national problem foisted on the States by Congress. See 505 U.S. at 175-176.

The Brady Act provisions at issue here stand in marked contrast to those struck down in *New York*. The law invalidated in *New York* was a "command [to] state government to enact *state* regulation" (either by legislation or administrative initiative) to deal with the problems of radioactive waste. *New York*, 505 U.S. at 178 (emphasis in original). In distinction, the Brady Act represents a clearly articulated congressional solution to the problems posed by handgun violence, especially insufficiently effective regulation of handgun transfers between private parties. The Brady Act does not require CLEOs to make policy; rather, like the statute upheld in *FERC*, the Act only requires state officials to assist in the application of federal law to private parties in the course of their ordinary duties. The Brady Act is therefore not an impermissible command to the States to promulgate laws or regulations, but an unobjectionable requirement that officials assist in "congressional regulation of individuals." *New York*, 505 U.S. at 178.

The critical distinction drawn in *New York* is, therefore, between Acts of Congress that require States "to enact a certain policy," see *Lopez*, 115 S. Ct. at 1642 (Kennedy, J., concurring), and those that do not. Petitioners, however, reject that distinction, based on this Court's observation in *New York* that the statute then before it did not involve Congress's "subject[ing] a State to the same legislation applicable to private parties." 505 U.S. at 160. From that sentence, they infer that *any* federal statutory obligation falling particularly on state or local officials is unconstitutional. That argument, however, misapprehends the Court's concerns in *New York*, and it does not explain *why* constitutional principles of federalism are not implicated when the States are subjected to generally applicable federal legislation.

What is significant for constitutional purposes about a statute of general application is that such an enactment, by its nature, *cannot* constitute a directive to the States to formulate state policy in response to a federal command. Rather, by such a provision, the States (along with private parties) are required to adhere to a clearly articulated federal policy. The central question addressed in *New York* need not be considered with respect to statutes of general applicability, for it does not arise.

When, however, Congress enacts a statutory obligation falling particularly on individuals who are state or local officials, it is necessary to examine the statute to determine whether Congress has impermissibly "require[d] the States to regulate," *New York*, 505 U.S. at 178, or whether it has merely enlisted the assistance of state or local officials in implementing federal law with regard to private conduct. The fact that the challenged provisions of the Brady Act are not generally applicable only *raises* the further question whether Congress has impermissibly intruded on state sovereignty by requiring the States to

make policy. In this case, the answer to that question is that Congress has not done so. See pp. 21-23, *supra*.

2. The Framing And Ratification Of The Constitution, As Well As Subsequent History, Demonstrate That Congress May Require State Officials To Assist In The Implementation Of Federal Law

a. The validity of the limited requirement of assistance by state and local officials in the implementation of federal law, as in the Brady Act, is underscored by the understanding of the Framers, actions of the early Congresses, and other historical evidence. Both proponents and opponents of the Constitution understood that, under our system of federalism, the national government could lawfully call upon state officials to provide assistance in implementing national policy governing private parties. To be sure, the Framers did not want the national government to be dependent on state legislation for the implementation of its laws (as had been the case under the Articles of Confederation and under the New Jersey Plan proposed at the Convention), and so they empowered Congress to legislate directly for the people of the Nation. See *New York*, 505 U.S. at 163-164. The Framers rejected the New Jersey Plan because they thought it would be ineffective in ensuring the faithful execution of national law, and also because it carried the potential for serious friction between the national government and the States; Alexander Hamilton ventured that, if the national government had no power to implement its laws directly, it might eventually be required to resort to armed force against the States in order to enforce its will. See *id.* at 165-166; *The Federalist* No. 15, at 95-96, No. 16, at 99-101 (J. Cooke ed. 1961).

The Framers therefore rejected a plan that would have required the national government to coerce the States to act *in their sovereign capacity* in order to implement the

law. See *The Federalist* No. 15, at 95-96 (Hamilton) (discussing flaws of confederacies requiring coercion against "bodies politic, or communities or States"). The Court's decision in *New York* reflects that specific concern, for the State of New York there was coerced by the federal government to exercise its sovereign power of legislation in order to implement federal will. This case, however, does not involve coercion of sovereign States, but the obligation of local officials to perform a modest duty in aid of the enforcement of federal law.[12] And in the Plan of the Convention—including the Constitution's Supremacy Clause—the national government was not prohibited from requiring local officials to assist in implementing federal law. Cf. *Ex parte Siebold*, 100 U.S. 371, 392 (1880) ("The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity.") In fact, the Framers thought that the execution of federal requirements by state and local officials could serve federalism well, for it would avoid the danger of a remote and unresponsive federal bureaucracy. See *The Federalist* No. 45, at 312-313 (Madison).

The issue was discussed to a considerable extent during the ratification of the Constitution, when opponents of the Constitution argued against empowering Congress to levy direct taxes. The Anti-Federalists stressed that a dual system of direct taxation, based on both state and fed-

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[12] Compare *Seminole Tribe of Florida* v. *Florida*, 116 S. Ct. 1114, 1124-1125 (1996) (emphasizing limits on Congress's power to abrogate States' sovereign immunity, and the "indignity of subjecting a State to the coercive process of judicial tribunals") with *Ex parte Young*, 209 U.S. 123, 155-156 (1908) (holding that "individuals, who, as officers of the State, are clothed with some duty in regard to the enforcement of the laws of the State * * * may be enjoined by a Federal court of equity from such action").

eral authority, would have the pernicious effect of subjecting citizens to two sets of intrusive revenue officers.[13] Supporters of the Constitution responded that Congress

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[13] Patrick Henry anticipated that sheriffs would be required to assist in federal tax collection: "The sheriff comes to-day as a state collector. Next day he is federal." 3 *The Debates In The Several State Conventions On The Adoption Of The Federal Constitution* 168 (J. Elliot ed. 1987). See also 1 *The Debate on the Constitution* 217 (Bernard Bailyn ed. 1993) (hereafter Bailyn) ("Cato," arguing that "the necessity to enforce the execution of revenue laws (a fruitful source of oppression)" would ultimately require a federal standing army); 1 Bailyn 502 ("Brutus," arguing that direct federal taxation "opens a door to the appointment of a swarm of revenue and excise officers to prey upon the honest and industrious part of the community"); *id.* at 506 ("Brutus," noting that direct taxes "will introduce such an infinite number of laws and ordinances, fines and penalties, courts, and judges, collectors, and excisemen, that when a man can number them, he may enumerate the stars of Heaven"); 1 Bailyn 613-616 ("Brutus," discussing generally dangers of double systems of taxation); 1 Bailyn 697 ("Brutus," arguing that national government should only have authority to raise revenue "of such a nature, that the tax should be raised * * * with few officers"); 1 Bailyn 939 (Nathaniel Barrell, at Massachusetts Convention, stating that "a continental collector will not be so likely to do us justice in collecting the taxes, as collectors of our own"); 2 Bailyn 119 ("Letter from John Williams to His Constituents," stating that "direct taxation, and to be collected by officers of Congress, are powers which cannot be granted agreeable to our present constitution, nor will it be very convenient for Congress officers, and our state collectors, to be collecting both at one time"); 2 Bailyn 633 (Patrick Henry, at Virginia Convention, warning that "the salaries and fees of the swarm of officers and dependents on the Government will cost this Continent immense sums," and specifically that "[d]ouble sets of collectors will double the expence"); *id.* at 635 (Patrick Henry, opposing Federalists' solution that "one collector may collect the Federal and State taxes," because, "if the Sheriff is to collect for both, * * * his collections will go to Congress"); 2 Bailyn 817 (Melancton Smith, at New York Convention, warning that there would be "two lists of all kinds of officers—supervisors, assessors, constables," and that the two sets of taxing officers "will be hostile to each other").

would likely "make use of the State officers and State regulations, for collecting" federal taxes, thus rendering "double sets of officers" unnecessary, and the threat from them illusory. See *The Federalist* No. 36 at 227 (Hamilton); see also *id.* at 226 (in assessing and collecting taxes, "[t]he national Legislature can make use of the *system of each State within that State*"). James Madison argued in particular that, although the federal government would theoretically have the power under the Constitution to collect taxes itself, "it is probable that this power will not be resorted to," and "the eventual collection under the immediate authority of the Union, will generally be made by the officers, and according to the rules, appointed by the several States"). *The Federalist* No. 45, at 312-313.[14] More generally, the Federalists argued that the Constitution would "enable the [national] government to employ the ordinary magistracy of each [State] in the execution of its laws," *The Federalist* No. 27, at 174 (Hamilton),[15] and

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[14] See also 2 Bailyn 655 (Madison, at Virginia Convention, noting that Congress "may even refer to the State systems of taxation").

[15] In using the term "magistracy," Hamilton plainly included executive officials. See *The Federalist* No. 27, at 175 (Hamilton) (noting that, by virtue of the Supremacy Clause, "the Legislatures, Courts and Magistrates of the respective [States] will be incorporated into the operations of the national government, as far as its just and constitutional authority extends, and will be rendered auxiliary to the enforcement of its laws") (emphasis omitted); see also *The Federalist* No. 44 (Madison) (referring generally to "State magistracy"); *The Federalist* No. 47, at 325-331 (Madison) (discussing role of "executive magistrate"); 2 Bailyn 618 (Madison replying to Patrick Henry, in Virginia Convention, referring to States' election of their "first Magistrate"). See generally *Black's Law Dictionary* 951 (6th ed. 1990) ("In its widest sense [magistracy] includes the whole body of public functionaries[.] * * * In a more restricted (and more usual) meaning, it denotes the class of officers who are charged with the application and execution of the laws.").

that it was "extremely probable that in other instances, particularly in the organisation of the judicial power, the officers of the States will be cloathed with the correspondent authority of the Union." *The Federalist* No. 45, at 313 (Madison). See also Samuel H. Beer, *To Make A Nation: The Rediscovery of American Federalism* 252 (1993) ("Madison himself expected the new federal government to govern through the state governments"); Caminker, 95 Colum. L. Rev. at 1043.

b. Consistent with the understanding of the Framers, the earliest Congresses enacted statutes that required the participation of state officials in the implementation of federal laws.[16] The First Congress required the clerk of "any common law court of record, in any one of the states," to record the application of a person seeking citizenship under federal naturalization laws. Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103. Congress enacted no provision at that time directing the clerks of federal courts to record such naturalization applications. In 1798, the Fifth Congress required clerks of courts—including state courts[17]—who had received declarations of intent by aliens seeking to

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[16] Legislation enacted by the early Congresses provides an important guide to understanding the Framers' constitutional plan. *E.g.*, *Myers* v. *United States*, 272 U.S. 52, 175 (1926); *Burrow-Giles Lithographic Co.* v. *Sarony*, 111 U.S. 53, 57 (1884); see also *Mistretta* v. *United States*, 488 U.S. 361, 398-401 (1989); *Marsh* v. *Chambers*, 463 U.S. 783, 786-792 (1983).

[17] Naturalization acts subsequent to 1790 made clear that the clerks receiving such declarations included state court clerks. See Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414 (1795) (requiring alien to declare "on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states"). A subsequent law passed by the Seventh Congress also reflects that understanding. See Act of Apr. 14, 1802, ch. 28, § 1, 2 Stat. 153 (1802) (alien "shall have declared, on oath or affirmation, before the supreme, superior, district or circuit court of some one of the states").

become citizens, "to certify and transmit * * * an abstract of such declaration" to the United States Secretary of State; the law also provided that clerks would be penalized $10 for failing to comply. Act of June 18, 1798, ch. 54, § 2, 1 Stat. 567. In 1802, the Seventh Congress directed court clerks to participate in the creation of a national registry of aliens, and required the clerks to issue certificates to aliens seeking naturalization. Act of Apr. 14, 1802, ch. 28, § 2, 2 Stat. 154-155. These early enactments were related to other early Acts of Congress, such as that passed by the First Congress, providing that aliens seeking naturalization could be admitted to citizenship by any state common law court of record. See Act of Mar. 26, 1790, ch. 3, § 1, 1 Stat. 103.[18]

Nor are such Acts of Congress limited to the Framers' era; Congress has, from time to time, found it necessary and proper to impose obligations on state officials to assist in the execution of federal policy. In the 1880s, when the federal government faced problems arising from mass unrestricted immigration, but lacked the administrative machinery to screen immigrants for the suitability of their entry into the United States, Congress established an interim scheme under which state officials examined immigrants arriving at ports to determine whether they should be excluded on the basis of a criminal conviction, a mental impairment, or poverty. See Act of Aug. 3, 1882, ch. 376, § 2, 22 Stat. 214. State officials were also required to send convicts back to their country of origin, and Congress expressly stated that that task should be undertaken under the direction of the Secretary of the Treasury, and without compensation. § 4, 22 Stat. 214. Once the federal government developed its own enforcement

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[18] Federal courts were not authorized to naturalize aliens until 1795. Act of Jan. 29, 1795, ch. 20, § 1, 1 Stat. 414.

apparatus to screen immigrants, Congress relieved state officials of that obligation. See Act of Mar. 3, 1891, ch. 551, 26 Stat. 1084.

Perhaps the salient example of the federal government's enlistment of state officials to assist in implementation of federal law is the mass registration of young adult men for the draft on June 5, 1917. When Congress enacted a selective draft law on May 18, 1917, there was no federal administrative machinery in place to provide for the registration of those eligible for the draft. Accordingly, Congress authorized the President "to utilize the service * * * of the several States * * * in the execution of this Act," and also provided that any state official designated by the President to perform a function who refused to do so would be guilty of a misdemeanor. Act of May 18, 1917, ch. 15, § 6, 40 Stat. (Part 1) 80-81. President Wilson issued a proclamation and regulations directing that state and local officials conduct a one-time mass registration.[19] The actual registration was carried out by local officials, principally county clerks and sheriffs. After the registration was completed, the local officials turned over the registration cards to federally appointed local draft boards, which were still being created while the registration was taking place.[20]

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[19] See Proclamation of May 18, 1917, 40 Stat. (Part 2) 20; Registration Regulations Prescribed by the President Under Authority of the Act of Congress Approved May 18, 1917 (Regulations). See especially Regulations ¶ 9: "As far as possible, the execution of the law in each State will be accomplished by State, county, and municipal officers and agencies." Because those Regulations were not printed in the regular serial set of government documents, we have lodged a copy with the Clerk of this Court and provided petitioners with a copy.

[20] See generally John Whiteclay Chambers II, *To Raise An Army: The Draft Comes to Modern America* 181-182 (1987); *Report of the*

Today as well, several federal statutes require participation by state and local officials in implementing federal regulatory schemes.[21] Under petitioners' theory, however, those Acts of Congress would all be unconstitutional. But as the examples we have given demonstrate, there simply is no flat rule prohibiting Congress from enlisting assistance from state officials in carrying out a federal program. In particular (as the immigration and draft registration examples noted above demonstrate), Congress may call on local assistance to implement a law during an interim period, while the federal government is devising its own permanent administrative machinery. The Brady Act falls securely into that paradigm.[22]

Provost Marshal General to the Secretary of War on the First Draft Under the Selective Service Act, 1917, at 7 (1918).

[21] *E.g.*, 42 U.S.C. 5779(a) (requires state and local law enforcement agencies to report cases of missing children); 23 U.S.C. 402(a) (requires state officials to implement highway safety programs and to report traffic fatalities); 42 U.S.C. 11001, 11003 (requires comprehensive data collection and reporting, as well as the creation of state emergency response commissions, with respect to the release of hazardous substances); 15 U.S.C. 2645 (requires governors to conduct certain reporting and approval activities with respect to local educational agencies); 20 U.S.C. 4013 (requires governors to submit plans for asbestos abatement and follow certain reporting procedures); 42 U.S.C. 6933 (requires inventories of state hazardous waste sites); 42 U.S.C. 6991a (requires governors to inventory underground storage tanks).

[22] Of course, it is possible to imagine hypothetical situations in which Congress might impose intolerable burdens on state and local governments in the execution of federal law. But as Justice Frankfurter noted of a similar issue in *New York* v. *United States*, 326 U.S. 572, 583 (1946), "[t]he process of Constitutional adjudication does not thrive on conjuring up horrible possibilities that never happen in the real world and devising doctrines sufficiently comprehensive in detail to cover the remotest contingency." And as Alexander Hamilton observed 150 years earlier about the Anti-Federalists' speculations of federal destruction of state autonomy, "[t]he moment we launch into

B. The Brady Act Imposes No Substantial Burden On The Functions Of Chief Law Enforcement Officers

Petitioners suggest that the Brady Act is unconstitutional because it imposes a burden, in terms of finances, effort, and time, on the functioning of their offices. This Court has made clear, however, that no constitutional problem exists simply because state officials must devote "substantial effort[s]" to implementing a federal requirement. See *South Carolina* v. *Baker*, 485 U.S. at 514-515. And the Court has established that federal mandates that cause States and local governments to spend money are not unconstitutional for that reason alone. See *FERC*, 456 U.S. at 770 n.33 (State's argument based on financial burdens was "unconvinc[ing]").

A constitutional problem might arise if the burden imposed by the federal legislation were so severe as to threaten the States' "separate and independent existence." *EEOC* v. *Wyoming*, 460 U.S. 226, 239 (1983); see *Garcia*, 469 U.S. at 556 (reserving question whether "the constitutional structure" might impose "affirmative limits" on

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conjectures about the usurpations of the foederal Government, we get into an unfathomable abyss, and fairly put ourselves out of the reach of all reasoning. Imagination may range at pleasure till it gets bewildered amidst the labyrinths of an enchanted castle, and knows not on which side to turn to extricate itself from the perplexities into which it has so rashly adventured." *The Federalist* No. 31, at 197. In fact, while Congress has the authority, in the exercise of its enumerated powers, to require the assistance of state and local officials in carrying out federal law, it has not exercised that authority routinely—which suggests that the fundamentally political safeguards in the Plan of the Convention that "preserv[e] the States' interests" have operated with success, and will continue to protect the States from undue intrusions by Congress. Cf. *Garcia*, 469 U.S. at 552-554; *id.* at 556 ("The political process ensures that laws that unduly burden the States will not be promulgated.").

federal action affecting the States). Such threats, however, are little more than academic hypotheticals, for "the built-in restraints that our system provides through state participation in federal governmental action * * * ensures that laws that unduly burden the States will not be promulgated." *Ibid.* Furthermore, it is unnecessary here to identify the precise boundaries of any "affirmative limits" that the constitutional structure might impose on federal action, for whatever those outer limits might be, they are not tested by the modest obligations that the Brady Act imposes on CLEOs.

A close examination of the Brady Act demonstrates that it does not have any substantial effect on the workings of state and local government. The Act imposes only temporary and minimal duties on local officeholders and grants them great discretion in determining how to meet those responsibilities. Moreover, the Act requires the assistance of CLEOs in implementing federal handgun control policy only because of the considered judgment of Congress that, in the short run, CLEOs are uniquely positioned to assist in the prevention of the illegal transfer of handguns. Further, Congress has provided significant financial assistance to the States in connection with criminal history records. In short, the Brady Act could be found unconstitutional only if this Court were to resurrect the long-repudiated view that "Congress 'has no power to impose on a State officer, as such, any duty whatever.'" *FERC*, 456 U.S. at 761 (quoting *Kentucky* v. *Dennison*, 24 How. (65 U.S.) 66, 107 (1861)); see *Monell* v. *New York City Dep't of Social Servs.*, 436 U.S. 658, 676-678 (1978) (noting that the constitutional theory of *Dennison* and similar decisions "has not survived").

1. a. The CLEOs' primary responsibility under the Brady Act is to make a "reasonable effort" to ascertain, by consulting "available" records, whether a legal impedi-

ment exists to a proposed handgun sale. 18 U.S.C. 922(s)(2). By 1999, however, the federal government must establish a national instant background check system, and CLEOs' obligations under the Act will terminate when such a system is in place. See 18 U.S.C. 922(s)(1) and 922 note. Firearms dealers will then be required to use the federal system to determine whether any legal impediment exists to the sale. 18 U.S.C. 922(t)(1). The temporary nature of the requirement, enacted in response to a national crisis of handgun violence, diminishes constitutional concerns. See pp. 30-31, *supra* (discussing use of state and local officials in draft registration during World War I); *Fry* v. *United States*, 421 U.S. 542, 548 (1975) (emphasizing, in sustaining the application of wage and salary freezes to state employees, that statute was an emergency measure); *National League of Cities* v. *Ursery*, 426 U.S. 833, 853 (1976) (stressing that *Fry* involved a statute of temporary applicability); cf. *Wayte* v. *United States*, 470 U.S. 598, 613 (1985) (noting, in rejecting a First Amendment challenge, that the challenged scheme was the "only effective interim solution" to a significant national problem).

Congress's decision to require assistance of CLEOs in the interim period was based on the judgment that CLEOs' access to relevant records and their personal knowledge of their communities would make them "best able to determine if the individual is disqualified to own a gun." H.R. Rep. No. 691, 101st Cong., 2d Sess. 11 (1990); see also *id.* at 10 (knowledge of CLEOs is a "[c]entral" benefit of the Act).[23] That decision to involve CLEOs in record checks

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[23] Accord *Brady Handgun Violence Prevention Act: Hearings on H.R. 1025 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 103d Cong., 1st Sess. 90 (1993) (*Hearings on H.R. 1025*) (statement of Rep. Schumer); *id.* at 89 (testi-

reflected the recommendation of state and local law enforcement officials. As the Superintendent of the New Jersey State Police testified before Congress, a CLEO is best situated to perform a record check because he "knows the people in his community. He knows where the complaints come from."[24]

Assistance by the CLEOs in enforcing the Brady Act also accords with our country's longstanding tradition—grounded largely in principles of federalism—against a national police force. See *Garcia* v. *United States*, 469 U.S. 70, 89 (1984) (Stevens, J., dissenting). Unless Congress relied on CLEOs for assistance (or decided to take no action to address the pressing problem of gun violence), it would have had to require federal law enforcement officers to perform background checks. Such a system would have diminished the historic role of local government in law enforcement, a result directly contrary to the principles of federalism on which petitioners rely.

At the same time, Congress carefully crafted the statute to limit its burden on CLEOs' available resources. Congress thus required only that a CLEO make a "reasonable effort" to determine the legality of a proposed handgun transfer. 18 U.S.C. 922(s)(2). As the court of appeals observed, the Brady Act's "reasonable effort" requirement represents "a minimal interference with state functions." Pet. App. 14a. That was also Congress's understanding when it established the interim requirements.

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mony of Ass't Attorney General Acheson); *Brady Handgun Violence Prevention Act: Hearings on H.R. 7 Before the Subcomm. on Crime and Criminal Justice of the House Comm. on the Judiciary*, 102d Cong., 1st Sess. 15 (1991) (statement of Rep. Sangmeister).

[24] *Waiting Period Before the Sale, Delivery, or Transfer of a Handgun: Hearings on H.R. 975 and H.R. 155 Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 100th Cong., 1st, 2d Sess. 243 (1987 and 1988) (*Hearings on H.R. 975 and H.R. 155*).

See House Report, *supra*, at 23 (reprinting Congressional Budget Office statement that Brady Act's financial "impact on any given jurisdiction is likely to be small").

b. Petitioners contend that the Brady Act places a substantial burden on them, but they disregard the crucial language of the Act requiring only a "reasonable effort." Congress did not require CLEOs to insure the legality of every, or indeed any, handgun transfer. Rather, Congress asked CLEOs to do only what is "reasonable" in their own circumstances, and in their own judgment. Put differently, the Brady Act's "reasonable effort" provision, by its terms, cannot place an "unreasonable" burden on any CLEO. The statutory language requiring only a "reasonable effort" was adopted precisely to avoid onerous burdens on CLEOs. See 139 Cong. Rec. S2001 (daily ed. Feb. 24, 1993) (statement of Sen. Kohl) (CLEOs will "use available resources"); 139 Cong. Rec. H9118 (daily ed. Nov. 10, 1993) (statement of Rep. Nadler) (checks will occur "within the constraints of existing information systems").[35]

Petitioners also fail to come to terms with ATF's definitive interpretative guidance on the meaning of the "reasonable effort" provision. ATF has stressed that the CLEOs themselves are "in the best position" to determine

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[35] As one law enforcement leader explained, the Act gives "[t]he law enforcement executive * * * discretion to determine what procedure best suits his or her agency." *Hearings on H.R. 1025*, *supra*, at 254 (testimony of Exec. Director of Police Executive Research Forum). Even before passage of the Brady Act, local law enforcement officials undertook similar record checks for a variety of purposes. A local official testified before Congress that, prior to the Brady Act, he would "run probably two or three checks a day in some cases on people who have been stopped for various things." *Hearings on H.R. 975 and H.R. 155*, *supra*, at 124 (testimony of Vice Pres. of Ohio Union of Patrolmen's Ass'n).

what measures are "reasonable" in any given instance. U.S. Resp. App. 15a. ATF has further noted that "[e]ach * * * CLEO will have to set it[s] own standards based on its own circumstances, *i.e.*, the availability of resources, access to records, and taking into account the law enforcement priorities of the jurisdiction." *Id.* at 14a-15a.

In addition, ATF explained that the statute requires no more than "some *minimal effort* to check commonly available records" and does not necessitate research into "every conceivable record system that may contain information relating to categories of prohibited persons." U.S. Resp. App. 13a-14a (emphasis added). Moreover, as ATF has made clear, because the "vast majority of persons who are prohibited from possessing a handgun are prohibited by virtue of some criminal background," a CLEO's reasonable effort may usually be limited to readily available criminal history records. *Id.* at 14a; see also 18 U.S.C. 922 note (permanent Brady system to be based on criminal history records). Indeed, in some circumstances, a CLEO may properly determine that it is reasonable not to engage in any research at all, as when purchasers are known personally to local officials, or when an emergency counsels against diversion of resources away from other law enforcement priorities of the jurisdiction to Brady Act background checks. See U.S. Br. App. 14a-15a.[35]

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[35] Petitioners' testimony in the district courts in these cases is difficult to reconcile with the account they now propose of the Brady Act's impact on their offices. Petitioner Mack testified that he generally relied on a computer check to meet his Brady Act responsibilities; his office performed an average of one check per day, conducted by a dispatcher in his office and then reviewed by the sheriff or his undersheriff. 5/31/94 Tr. 6-7. Petitioner Printz offered no testimony about the burdens actually imposed on his office by the Act. He identified a series of records that might be relevant to an extensive background check of a person seeking to purchase a handgun, 95-1478

In sum, as the court of appeals concluded, petitioners "have not been subjected to any interpretation of the Act, or any attempt to enforce it against them, that requires them to do more than check computer records." Pet. App. 16a. Because that "minimal effort" (U.S. Br. App. 13a) presents no substantial threat to the independent functioning of local government, the record-check requirement passes constitutional muster.[27]

J.A. 10a-13a, and stated that "whether a failure to examine them would be 'reasonable' or 'unreasonable' within the meaning of the law I cannot guess." *Id.* at 10a. He also stated that, depending on the search required under the law, a check of the records "might require anywhere from a man-hour to several man-days," and declared that "[i]f I am now compelled to perform background checks of our residents, it will have to be done by pulling deputies off patrol and investigation duties." *Id.* at 14a. Those speculations, however, fail to take into account ATF's definitive construction of the "reasonable effort" requirement to refer to a "minimal effort" to check computer records and readily available criminal-history records. Moreover, petitioner Printz testified that his office frequently checked computerized criminal-history records even before enactment of the Brady Act. *Id.* at 33a-34a.

[27] Cf. *South Carolina* v. *Baker*, 485 U.S. at 529 (Rehnquist, C.J., concurring in the judgment) (concluding that requirements at issue had no "substantive effect" on significant state functions). In analogous areas of separation of powers, the Court has emphasized that minimal intrusions do not raise issues of constitutional magnitude. See *Morrison* v. *Olson*, 487 U.S. 654, 691 (1988) (upholding limitation on President's power to remove special prosecutor because it does not "unduly trammel[] on executive authority"); *Helvering* v. *Gerhardt*, 304 U.S. 405, 421 (1938) (to establish tax immunity, State would have to show that "the burden upon the state function is actual and substantial, not conjectural"); *Department of Taxation & Finance* v. *Milhelm Attea & Bros.*, 114 S. Ct. 2028, 2035-2036 (1994) (reconciliation of state and tribal powers is not governed by a "rigid rule" based on "mechanical or absolute conceptions of state or tribal sovereignty," and the general rule that a State may not regulate Indian traders is not contravened by a state law imposing "minimal burdens" on reservation retailers).

2. The two additional obligations of CLEOs under the Brady Act are even less onerous. The requirement that a CLEO destroy the records pertaining to a record check if that check does not reveal that the transferee is prohibited from possessing firearms (18 U.S.C. 922(s)(6)(B)(i)) is clearly *de minimis* and therefore without constitutional significance. Sheriff Mack explained that he fulfills that obligation by reminding his secretary "from time to time" to destroy the documents. 5/31/94 Tr. 9.

Similarly, the requirement that a CLEO, on request, inform the transferee of the reason that he has found a legal impediment to a proposed handgun transfer (18 U.S.C. 922(s)(6)(C)) is not burdensome. That provision requires only that the CLEO note the legal bar to the sale by stating, for example, that records indicate that a prospective purchaser is a convicted felon. That obligation could be met by checking a box on a form. Neither petitioner testified in the district court proceedings about any burden in connection with that requirement.

3. Finally, in enacting the Brady Act, "Congress has not simply placed a financial burden on the shoulders of States and localities * * * but has provided substantial countervailing financial assistance as well," see *Garcia*, 469 U.S. at 555, a factor that further diminishes constitutional concerns. See *FERC*, 456 U.S. at 751-752 n.14, 770 n.33. Congress has made a "huge" financial commitment to assisting the States with implementation of the Brady Act. *Hearings on H.R. 1025*, note 23, *supra*, at 104 (testimony of Ass't Att'y Gen. Acheson). Specifically, the Brady Act authorizes $200 million in funds for grants to States for the "creation of a computerized criminal history record system or improvement of an existing system," improvement of their "access[] to the national instant criminal background system," and (once the national system is in place), "assist[ance to] the State[s] in the

transmittal of criminal records" to that system. 18 U.S.C. 922 note. Congress has already appropriated $100 million of those funds for disbursement to the States. Violent Crime Control Appropriations Act, 1995, Pub. L. No. 103-317, Tit. VIII, 108 Stat. 1777 (1994). The interim statutory requirements are thus emphatically "not an unfunded mandate." 139 Cong. Rec. S16,304 (daily ed. Nov. 19, 1993) (statement of Sen. Mitchell).[28]

C. Petitioners' Commerce Clause Argument Adds Nothing To Their Tenth Amendment Argument.

Petitioners argue that, in addition to violating the Tenth Amendment, the Brady Act exceeds Congress's authority under the Commerce Clause. See Printz Br. 26-28; Mack Br. 35-40. As this Court explained in *New York*, however, when it is argued that the Commerce Clause is violated because Congress has regulated organs of state government, the inquiries under the Commerce Clause and the Tenth Amendment are merely "mirror images of each other." 505 U.S. at 156. "[I]f a power is an attribute of state sovereignty reserved by the Tenth Amendment, it is necessarily a power the Constitution has not conferred on Congress." *Ibid.* Accordingly, the Commerce Clause adds nothing to petitioners' argument based on the Tenth Amendment.[29]

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[28] That funding augments the significant pre-existing federal commitment in the area of criminal history records. Under the formula grant program established by the Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, the United States provided nearly $850 million to States in fiscal years 1992 and 1993. See 95-1503 J.A. 12, 16. Five percent of the grant money (over $40 million in 1992 and 1993) must be used for improving state criminal history records. *Id.* at 23-24; 42 U.S.C. 3759(a).

[29] In *FERC*, the State of Mississippi made a similar argument, that PURPA violated the Commerce Clause in addition to the Tenth Amendment, because the Commerce Clause did not empower Congress to direct States to regulate. 456 U.S. at 754-755. The Court concluded

Congress clearly has authority under the Commerce Clause to make laws governing the transfer of firearms in and affecting commerce. *E.g.*, *United States* v. *Haddad*, 558 F.2d 968, 972-974 (9th Cir. 1977). Indeed, petitioners do not even suggest that the transfers of firearms do not "substantially affect[]" interstate commerce. Cf. *Lopez*, 115 S. Ct. at 1630. The Brady Act reinforces preexisting restrictions under the GCA against transfers to disqualified persons of guns in or affecting commerce, see 18 U.S.C. 922(b) and (g), and the Brady Act operates only in conjunction with proposed commercial transfers of handguns by federally licensed firearms importers, manufacturers, and dealers, see 18 U.S.C. 922(s)(1). Thus, unlike the statute invalidated in *Lopez*, the Brady Act is a "regulation of an activity that substantially affects interstate commerce." 115 S. Ct. at 1630. Indeed, the Brady Act is a regulation of commerce itself, or at the least is an "essential part of a larger regulation of economic activity, in which the regulatory scheme could be undercut" without the Act. *Id.* at 1631.

Since the regulated activity, the transfer of firearms, is legitimately subject to federal regulation under the commerce power, "the only remaining question for judicial inquiry is whether the means chosen" by Congress are "reasonably adapted to the end permitted by the Constitution." *Hodel* v. *Virginia Surface Mining & Reclamation Ass'n*, 452 U.S. 264, 276 (1981) (internal quotation marks omitted). "The judicial task is at an end once the court determines that Congress acted rationally in adopting a particular regulatory scheme." *Ibid.* Petitioners have offered no basis for a conclusion that the Act is an irrational means of advancing the end of regulating the

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that the Commerce Clause supported Congress's exercise of regulatory authority. *Id.* at 755-758.

sale of firearms to persons not lawfully entitled to receive them.

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In sum, the Brady Act is a reasonable congressional response to a national problem that does not impinge on values of federalism or any aspect of power reserved to the States under the Tenth Amendment. The federal government has not compelled the States to enact into law a regulatory regime, nor has it foisted onto the States the obligation to solve a controversial policy issue. The policies of the Brady Act are clearly those of the federal government, and Congress and the President are directly accountable for their highly publicized actions in passing and signing the Brady Act. Indeed, the Brady Act advances values of federalism by temporarily placing the record-check function in the hands of local officials, who are most likely to know the community where the proposed firearm transfer is to occur. The obligations of local officeholders under the Brady Act are reasonable, indeed minimal, and the "reasonable effort" provision of the Brady Act was enacted (by Congress) and interpreted (by ATF) to provide CLEOs with the discretion needed to allocate their resources as they see fit while undertaking the review of readily available records. No interest of federalism would be advanced by invalidating the Act.

II. EVEN IF ANY OF THE CHALLENGED PROVISIONS OF THE BRADY ACT CONTRAVENES THE TENTH AMENDMENT, NO OTHER PROVISION OF THE ACT SHOULD BE INVALIDATED

A. The Validity Of The Five-Day Waiting Period And Notification Requirements Imposed On Firearms Dealers Is Not Properly Before The Court

Petitioners have argued that, if the Brady Act's record-check and destruction-of-records requirements imposed on CLEOs are held unconstitutional, three other provisions of the Act must fall with them: the five-day waiting period imposed on firearms dealers under Section 922(s)(1)(A)(ii)(I); the duty imposed on firearms dealers, under Section 922(s)(1)(A)(i)(III), to notify CLEOs of an impending firearm transfer and provide identifying information about the transferee; and the duty imposed on CLEOs, under Section 922(s)(6)(C), to explain to transferees why the CLEO has found a legal impediment to the transfer. See Mack Br. 40-45; Printz Br. 33-45.

This Court should not reach the question of the continuing validity of the duties imposed only on firearms dealers, namely the five-day waiting period and the requirement that dealers provide notice to CLEOs of impending transfers. Petitioners lack Article III standing to challenge those provisions of the Act, which have no impact on them. The irreducible constitutional minimum of standing requires "that the party seeking review be himself among [those] injured" by the provision under challenge, *Sierra Club* v. *Morton*, 405 U.S. 727, 735 (1972). "[A] party seeking review must allege facts showing that he is himself adversely affected." *Id.* at 740.

A firearms dealer might conceivably bring a lawsuit contending that the notification and five-day waiting

period requirements are inseverable from invalid portions of the Brady Act, and are therefore no longer valid law. No such party is presently before the Court, however. Accordingly, petitioners have asked this Court to decide what is, at this point, a purely academic question of severability. Petitioners plainly have a sincere interest in that question, but "a mere 'interest in a problem'" is insufficient to confer standing. *Sierra Club*, 405 U.S. at 739; cf. *United States* v. *National Treasury Employees Union*, 115 S. Ct. 1003, 1018 (1995) (holding that relief should not be provided to nonparties "when a narrower remedy will fully protect the litigants").

Moreover, neither petitioner presented any question of severability in his petition for a writ of certiorari. See 95-1478 Pet. i; 95-1503 Pet. i. Petitioners presented for review only the question of the constitutionality of particular provisions of the Brady Act directly affecting them. Accordingly, insofar as petitioners are asking this Court to strike down provisions of the Brady Act not affecting them, to which no Tenth Amendment challenge has been made, those contentions are not properly before the Court. See Sup. Ct. R. 14.1(a); *Yee* v. *City of Escondido*, 503 U.S. 519, 535-538 (1992).[30]

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[30] By contrast, the continuing validity of the requirement that CLEOs provide notice to transferees of their reasons for concluding that a proposed transfer would be illegal is properly before the Court. Petitioners presented a Tenth Amendment challenge to that provision. This Court has, under similar circumstances, considered the continuing validity of statutory provisions that were upheld against constitutional challenge but were related to other parts of the statute that were successfully challenged. See *New York* v. *United States*, 505 U.S. at 186-187. Petitioners also have Article III standing to challenge that provision, because it directly affects them.

B. Each Of The Challenged Provisions Is Severable From The Remainder Of the Brady Act

1. As every lower court that has addressed the issue has concluded, the provisions of the Brady Act under challenge here are fully severable from the rest of the Act.[31] Those unanimous rulings are the correct result of the stringent test that this Court has established in its severability decisions for invalidation of an entire statutory scheme on the basis of a holding that individual provisions are unconstitutional. This Court has explained on numerous occasions: "[A] court should refrain from invalidating more of the statute than is necessary. . . . 'Whenever an act of Congress contains unobjectionable provisions separable from those found to be unconstitutional, it is the duty of this court to so declare, and to maintain the act in so far as it is valid.'" *Alaska Airlines* v. *Brock*, 480 U.S. 678, 684 (1987); see *Regan* v. *Time, Inc.*, 468 U.S. 641, 652 (1984) (plurality opinion).

Accordingly, "[u]nless it is evident that [Congress] would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law." *New York*, 505 U.S. at 186; see also *United States* v. *Jackson*, 390 U.S. 570, 585 (1968). "[T]he unconstitutional provision *must be severed* unless the statute created in its absence is legislation that Congress would not have

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[31] In addition to the district court decisions in these cases (see Pet. App. 61a-66a; 95-1503 Pet. App. 46-49), see *McGee* v. *United States*, 863 F. Supp. 321, 327 (S.D. Miss. 1995), aff'd *sub nom. Koog* v. *United States*, 79 F.3d 452, 462-463 (5th Cir. 1996), petition for cert. pending, No. 95-2052; *Frank* v. *United States*, 860 F. Supp. 1030, 1044 (D. Vt. 1994), aff'd in part, rev'd in part, 78 F.3d 815 (2d Cir. 1996), petition for cert. pending, No. 95-2006; *Romero* v. *United States*, 883 F. Supp. 1076, 1088-1089 (W.D. La. 1994), appeal pending, No. 95-30355 (5th Cir.).

enacted." *Alaska Airlines*, 480 U.S. at 685 (emphasis added). Petitioners' burden of demonstrating inseverability is especially heavy here, because the Gun Control Act, of which the Brady Act is a part, contains an express severability provision. See 18 U.S.C. 928; p. 2, *supra*. That provision creates a presumption of severability that may be overcome only by "strong evidence" of a contrary congressional intent. *Alaska Airlines*, 480 U.S. at 686.[32]

2. Without the "reasonable effort" requirement of Section 922(s)(2), the remainder of the interim scheme would be fully operative as a law. Gun dealers could readily inform CLEOs of proposed gun transfers, as required by Section 922(s)(1)(A)(i), and CLEOs who would conduct background checks voluntarily (even on an occasional basis) would find the information provided by the dealer

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[32] Petitioner Printz erroneously relies on *Alaska Airlines* (Br. 47-48) for the proposition that the general severability provision of the GCA does not apply to the Brady Act because the Brady Act added a "new program." In *Alaska Airlines*, the Court expressed doubt about the applicability of the preexisting severability clause of the Federal Aviation Act of 1958 (FAA) to the challenged provisions of the Airline Deregulation Act of 1978 (ADA), because, although other parts of the ADA did amend the FAA, the challenged provisions did not do so. See 480 U.S. at 686-687 n.8. The Brady Act, by contrast, was enacted as an amendment to the Gun Control Act, and became an integral part of it. Section 102(a)(1) of the Brady Act begins, "Section 922 of title 18, United States Code, is amended by adding the following:", after which it enacts into law a new Subsection 922(s) of Title 18. See Pet. App. 76a; 107 Stat. 1536. The GCA comprises Sections 921 through 928 of Title 18. Section 922, before passage of the Brady Act, included a lengthy list of prohibited acts. The Brady Act made the firearms dealer's failure to wait five days or the result of a CLEO's record check before transferring a handgun one of those prohibited acts. See 18 U.S.C. 922(s)(1). Cf. *Leavitt* v. *Jane L.*, 116 S. Ct. 2068, 2070 (1996) (noting that the severability provision of the Utah abortion code predated the provisions invalidated by the Tenth Circuit, which were enacted as amendments to that code, and held severable by this Court).

useful in conducting the check. The five-day waiting period imposed on dealers by Section 922(s)(1)(a)(ii)(I) would provide the CLEO with a reasonable time in which to conduct the check, and the dealer would be allowed to transfer the weapon after five business days had passed, as is the case with the mandatory record check enacted by Congress. Moreover, a CLEO would have to provide written reasons for rejecting a handgun transfer, under Section 922(s)(6)(C), only if the CLEO voluntarily chose to conduct a record check.

Such a regime would further one of Congress's leading purposes in enacting the Brady Act—ensuring, through record checks, more effective enforcement of the Gun Control Act's prohibitions on transfers of firearms to felons and others. With the waiting period and background information supplied by the dealers, CLEOs would have the time and information necessary to perform those record checks if they chose to do so. CLEOs might well conduct such checks voluntarily to prevent unlawful transfers. See House Report 13, 14 (noting support of the Fraternal Order of Police, the International Association of Chiefs of Police, and other law enforcement groups for record). Thus, the situation here is analogous to that in *New York*, where the Court found the invalid parts of the statute severable because Congress's "overall intent" would not have been frustrated by leaving the valid provisions in force. 505 U.S. at 186.[33]

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[33] Severance of the invalid parts of the Act would also further Congress's intent to provide a cooling-off period for gun sales to reduce crimes of passion. Brady Act supporters saw the cooling-off period as a significant benefit of the legislation. See, *e.g.*, 139 Cong. Rec. S16,323 (daily ed. Nov. 19, 1993) (statement of Sen. Kohl); *id.* at S16,319 (statement of Sen. Murray); *id.* at S16,324 (statement of Sen. Lautenberg); *id.* at H9089 (daily ed. Nov. 10, 1993) (statement of Rep. Derrick); *id.* at H9106 (Rep. Roukema); *id.* at H9110 (statement of Rep. Schenk).

Petitioners rely primarily on the self-evident fact that Congress preferred a mandatory record check to an optional check. The question here, however, is not whether Congress wanted the mandatory check that it enacted into law; plainly it did. Rather, the issue is whether it is clear that Congress would have preferred no law at all to a voluntary record-check provision and the five-day waiting period needed for those checks to be conducted. See *New York*, 505 U.S. at 186; *Alaska Airlines*, 480 U.S. at 684. It is hardly "evident" that Congress, deeply concerned about the national "epidemic of handgun violence," would have rejected a voluntary record check had it been clear that such was the only option available to it.[34]

Petitioners note that the 102d Congress considered, but did not enact, a version of the Brady bill that did not contain a mandatory record check provision. The failure of a different Congress to enact different legislation does not provide the strong evidence needed to defeat the

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Congress also expressed its support for cooling-off periods by defeating amendments intended to preempt state waiting periods enacted for that purpose. See 139 Cong. Rec. S16,307-S16,321 (daily ed. Nov. 19, 1993); *id.* at H9141 (daily ed. Nov. 10, 1993).

[34] Petitioner Printz's reliance (Br. 48-50) on *Leavitt* v. *Jane L.*, 116 S. Ct. 2068 (1996), is misplaced. First, the *Leavitt* decision applied Utah severability law. *Id.* at 2069. Second, to the extent that *Leavitt* is relevant, it supports a holding that the challenged provisions of the Brady Act are severable. In reversing the Tenth Circuit, which had refused to sever provisions of a Utah statute, this Court explained:

> Every legislature that adopts, in a single enactment, provision A plus provision B intends (A + B)[.] * * * The relevant question * * * is not whether the legislature would prefer (A + B) to B, because by reason of the invalidation of A that choice is no longer available. The relevant question is whether the legislature would prefer not to have B if it could not have A as well.

Id. at 2071.

presumption of severability. See *Alaska Airlines*, 480 U.S. at 686. Petitioners speculate that, of the numerous possible reasons that the earlier bill did not pass, one—the failure to include a mandatory check—was decisive. Such speculation is precarious at best; indeed, the 102d Congress failed to approve the Brady Bill even after the mandatory record check provision was inserted. See H.R. Conf. Rep. No. 405, 102d Cong., 1st Sess. 24 (1991). In the end, Congress's failure to enact a prior version into law reveals nothing about its intent with respect to severability, and certainly nothing so relevant as its *express* severability provision.[35]

3. There is also no reason to conclude that the *de minimis* record destruction requirement of Section 922(s)(6)(B)(i) cannot be severed from the separate requirement that firearms dealers provide CLEOs with information about prospective purchasers. Petitioner Printz suggests (Br. 39-42) that the latter requirement, without the former, would be contrary to Congress's

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[35] Cf. *Schneidewind* v. *ANR Pipeline Co.*, 485 U.S. 293, 306 (1988) ("This Court generally is reluctant to draw inferences from Congress' failure to act."); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 382 n.11 (1969) ("unsuccessful attempts at legislation are not the best of guides to legislative intent"). Petitioners seek to draw support from the fact that a handful of legislators stated that the mandatory check was decisive in their support of the bill. That evidence, however, does not override the more persuasive point that, even without a mandatory record check, the rest of the Brady Act would further Congress's objectives. See *EEOC* v. *Hernando Bank, Inc.*, 724 F.2d 1188, 1191-1192 (5th Cir. 1984) (act severable even though a legislator opined both that unconstitutional provision was "integral" to the act and that the act's lack of severability clause was intentional). Moreover, since Congress did enact the mandatory provision, it is unsurprising that legislators who would have also supported a waiting period and voluntary record check as a second-best preference did not speak to that point.

refusal to establish a national system of gun registration. Congress's intent with respect to *federal* gun registration is irrelevant, however, for under the Brady Act, the dealer sends the background information to the CLEO, not to a federal official. The CLEO would remain free to use that information in a voluntary record check. Moreover, the Brady Act separately restricts CLEOs' authority to use the information for any purpose other than conducting a record check. See 18 U.S.C. 922(s)(6)(B)(iii).

Petitioners' severability argument also fails with respect to the requirement that CLEOs provide reasons on request if the background check reveals disqualifying information about the transferee. If the Court were to find the "reasonable effort" provision unconstitutional, a CLEO would only be called upon to explain the results of a record check if the CLEO first voluntarily decided to conduct such a check. Thus, if the "reasonable effort" provision is removed, the written reasons requirement effectively becomes optional. Second, Congress might well have believed that, even if a CLEO voluntarily conducted a record check and found disqualifying information about the transferee, the transferee would be entitled to an explanation of that information as a matter of fairness.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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